

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

G, a 12-year-old minor suing)
by a fictitious name for)
privacy reasons. Mother and)
Father suing under fictitious)
names to protect the identity)
and privacy of G., their)
minor child,)

Plaintiffs,)

vs.)

Case No. 15cv40116-TSH

The Fay School, by and)
through its Board of)
Trustees, and Robert)
Gustavson,)

Defendants.)

BEFORE: The Honorable Timothy S. Hillman

Scheduling Conference

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
January 13, 2016

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399 justicehill@aol.com
Mechanical Steno - Transcript by Computer

1 APPEARANCES:

2 Markham & Read
3 John J.E. Markham, II, Esquire
4 One Commercial Wharf West
Boston, Massachusetts 02110
on behalf of the Plaintiffs

5 Schwartz Hannum, PC
6 Jaimie A. McKean, Esquire
7 11 Chestnut Street
Andover, Massachusetts 01810
on behalf of the Defendants

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1 a -- a request for commissions.

2 So what's -- so I have read the complaint and amended
3 complaint so I have a sense of what's going on, but just give
4 me a few bars on what's going on with G, and -- and then Ms.
01:49:44PM 5 McKean, I'll hear from you.

6 MR. MARKHAM: Very well. Very quickly, starting about
7 two years ago, maybe a little less, he started noticing
8 symptoms: headaches, dizziness, lack of concentration, heavy
9 breathing, and heart palpitations and the like. Through a
01:50:01PM 10 series of doctors, he got diagnosed as having this EHS
11 syndrome, which is a syndrome that its proponents contend is
12 caused by being exposed to too much WI-FI creating those
13 reactions.

14 He brought it to Fay's attention through his parents,
01:50:21PM 15 and Fay and his parents have since the beginning not agreed on
16 whether he has this, whether it's a recognized disability, and
17 what to do about it.

18 I got involved about four or five months ago, four or
19 five months before the complaint. We tried a negotiation with
01:50:40PM 20 Fay. It didn't work out. I filed the lawsuit, and what I
21 sought in the lawsuit initially, your Honor, was not just --
22 not only a complaint, but a motion for a preliminary injunction
23 ordering Fay to let our computer expert in to check out the
24 WI-FI to see if we could figure out if there was any way to
01:50:58PM 25 turn down the waves, or put some Ethernet cables in, rather

1 than using WI-FI.

2 Once we filed the motion where they hadn't done it
3 before, they agreed to let us come in to see if we could figure
4 something out. We had three meetings at the school with some
01:51:16PM 5 experts from them, Ms. Jaimie McKean, my opposing counsel, and
6 myself. They were all very cordial. They made some efforts to
7 put a cable net in for him, an Ethernet cable for him, and to
8 move his desk away from the main WI-FI. It wasn't enough, and
9 it didn't work. We asked for more. They did not think it
01:51:39PM 10 would work. They didn't think it was appropriate. So there
11 was no point in going back in, and we couldn't go back in for
12 what we wanted to. We said, okay. Answer the complaint. They
13 did. But before they answered the complaint, I said, you know,
14 based on what we found out when we were in there, facts about
01:51:57PM 15 your WI-FI, I want to amend the complaint once as of right I
16 get a chance to do that. I did that, added some facts into the
17 complaint that had occurred, or which we found out about after
18 we filed the initial complaint. So right now we're at the
19 amended complaint stage.

01:52:14PM 20 The only other thing I will tell you, your Honor, is
21 that -- two things is that I would like to amend the complaint
22 again to add just another count, no new facts. The new count
23 is simply that we contend that not only, as we have alleged in
24 the complaint and the amended complaint, that Fay has failed to
01:52:32PM 25 provide reasonable accommodations, as they're required to under

1 the Americans With Disabilities Act, but they have also
2 retaliated against G and his family for the -- for the claims
3 that they have made both before filing the complaint and after.
4 There's a special section in the Americans With Disabilities
01:52:53PM 5 Act allowing for a retaliation claim. And so we have done
6 that. Obviously that -- Ms. McKean can speak for herself. She
7 denies both retaliation and a failure to make an accommodation.

8 THE COURT: I'm guessing Ms. McKean is not going to
9 agree with that but --

01:53:07PM 10 MR. MARKHAM: I don't think she's going to agree with
11 much of what I said, but --

12 THE COURT: -- we're going out on the limb here.

13 MR. MARKHAM: Right.

14 THE COURT: And before I hear from Ms. McKean,
01:53:14PM 15 Mr. Markham, so what's G's status? He's -- is he still
16 enrolled, and he is a --

17 MR. MARKHAM: No.

18 THE COURT: -- student in good standing?

19 MR. MARKHAM: He's in good standing. Here's the
01:53:26PM 20 situation. It's a bit of a hybrid. He started the school year
21 in good standing this year, 2015, in September. He started
22 getting headaches and started missing some school. We made a
23 couple of adjustments trying to work it out with Ms. McKean.
24 It didn't work out. The headaches kept continuing. So he
01:53:44PM 25 asked for a medical leave between Thanksgiving and Christmas to

1 see if we couldn't work out something and he could stay home,
2 get a tutor, get his assignments and keep up with things, still
3 enrolled in school. Presently he's still enrolled in school.
4 His tuition is paid up-to-date. The family is going to put him
01:54:04PM 5 into another school that does not have WI-FI on an interim
6 basis while we get this case decided by the court. This is not
7 just a futile exercise. The Fay School is extremely expensive.
8 It runs for nine years. It has a beginning, a middle, and an
9 end, which are very integrated. He is -- he is a seventh
01:54:24PM 10 grader. He has done the first two-thirds. He wants
11 desperately to finish both with his peers and his athletics,
12 and with a continuum of their educational system which is, you
13 know, it's a dream. It's costly, but it's a dream. And the
14 last one-third integrates with the second one-third and the
01:54:41PM 15 first one-third. So he wants to hold on to that, so he's going
16 to stay at another school. He is going to try to keep up with
17 the Fay assignments. If your Honor orders an accommodation
18 that works after either a preliminary injunction later on or a
19 trial --

01:54:54PM 20 THE COURT: Okay. Hold up.

21 MR. MARKHAM: -- and if we get something that he would
22 go back and he could make up the work and continue, fine. If
23 he has to stay back a year, his parents want to do that.

24 THE COURT: Thanks.

01:55:03PM 25 MS. McKEAN: I actually agree with more than

1 Mr. Markham thinks I agree with. With respect to his statement
2 of the facts, we do agree with most of what happened in the
3 last few months with the exception -- two major exceptions.

4 The first being it wasn't because of the complaint
01:55:17PM 5 that we allowed the first inspection. The fact is we had
6 already reached an agreement with Mr. Markham that G would have
7 two independent medical evaluations at the Boston Children's
8 Hospital of doctors that my client was not any way connected
9 to. In fact, I have never spoken with those doctors. They had
01:55:34PM 10 never spoken with doctors. These were two completely --
11 actually, it was two different clinics at Boston Children's
12 Hospital and they were saw -- they were seen by a set of
13 doctors at both of those.

14 Both of those evaluations resulted in no diagnosis of
01:55:47PM 15 EHS; and actually the second one recommended that he remain in
16 school, take a medication, learn some relaxation techniques and
17 some other techniques to deal and -- and to alleviate his
18 symptoms. So that is the reason that we did -- we held off on
19 the inspection because the agreement was if the -- if the IME
01:56:08PM 20 find EHS, then we will allow the inspection.

21 Mr. Markham, of course, then filed the complaint. We
22 continued negotiations about the inspection. We actually went
23 in five times, not three times as a group. We did not restrict
24 them in any way, shape, or form. They were allowed to see what
01:56:24PM 25 they wanted to see. They were allowed to bring who they wanted

1 to bring. Unfortunately, they did not bring an IT expert that
2 actually could weigh in on ways to try to come to a solution.
3 The Fay School, however, did. And we brought an individual in,
4 who initially the plaintiff, the mother, recommended to the
01:56:44PM 5 school. He had done an analysis of the WI-FI at the school
6 long before the case was filed and found that it was completely
7 safe.

8 So we brought him in with us on all of these
9 inspections, or all of these walkthroughs, and he came up with
01:56:59PM 10 some ideas. We then proposed those ideas to the plaintiffs.
11 They wanted to take some measurements. We allowed them to do
12 that. They came in. They took the measurements without any
13 kind of experts. They did it themselves. And even though we
14 didn't find that reliable, we allowed them to do that because
01:57:16PM 15 we were trying to find a resolution. We then instituted that
16 first proposal.

17 We then instituted a second proposal.

18 So we have tried very, very hard to try to resolve
19 this. Ultimately, they asked for a leave, which we also
01:57:30PM 20 granted. So.

21 With respect to what happened over the last few
22 months, a lot happened over the last few months. We allowed
23 them to go to the school a number of times and were actively
24 working and coming up with some proposal, and we ultimately
01:57:42PM 25 reduced his exposure to radio frequency emissions in the

1 school.

2 And as a result our -- you know, at that point we had
3 to say to them, you still haven't shown us that it's the WI-FI
4 that's causing his symptoms, and we've tried to reduce the
01:57:57PM 5 radio frequency emissions, and anything further is going to
6 cause us to fundamentally alter our educational activities at
7 the school, and we just -- the ADA doesn't require us to do
8 that, and we just can't do that. And that's why they asked to
9 take the leave, which they did.

01:58:14PM 10 THE COURT: So why wouldn't -- wouldn't it -- isn't in
11 everybody's interest to get this thing to trial as soon as
12 possible? And by that I mean like in a month or two? I mean,
13 let's do it. I mean this kid is waiting. You're -- you have
14 exposure. You have a client who wants to go back to school. I
01:58:33PM 15 mean what's left to do here?

16 MS. McKEAN: Well, all of the discovery. We haven't
17 done any of the discovery, and I can tell you that I did do a
18 sweep of documents recently to get any document with basically
19 the plaintiff's last name in here, and they did have another
01:58:49PM 20 child at that school. So there's a lot of documents, thousands
21 and thousands of documents with just their name on it. So it's
22 going to take a substantial amount of time to get through
23 those, figure out what's relevant, figure out what needs to be
24 produced.

01:59:02PM 25 The other thing is that this is a very complicated

1 issue. We expect to have at least two experts, at least, and
2 one of them we have not hired because we didn't know if we were
3 going to try to resolve it. We hired the WI-FI expert, but we
4 didn't hire any kind of medical expert.

01:59:17PM 5 THE COURT: So you've -- you've asked for May 31st so
6 why don't we -- so why don't we rock and roll early in the
7 summer then so they will have something to -- you can know and
8 they can know in the fall that they've got a student or not.

9 MS. McKEAN: Because we do think that there's a chance
01:59:35PM 10 at that point that we may ask for summary judgment briefings,
11 and that's why -- Mr. Markham and I talked about this. You
12 know, he was talking about a trial date. I was talking about
13 possible summary judgment, but I won't know if I'm going to
14 file summary judgment until we get through discovery, which is
01:59:51PM 15 why we asked for a status conference so we --

16 THE COURT: Why don't we have the summary judgment
17 then heard in June; and then if it's in your favor, good luck
18 to you and the Red Sox; and if it's not, we have a trial.

19 MS. McKEAN: Except that at this stage we have through
02:00:08PM 20 May to finish discovery.

21 THE COURT: There you go.

22 MR. MARKHAM: The fact is that any of the individuals
23 that are going to be deposed from the school are obviously
24 actively engaged in school activities and are going to need
02:00:19PM 25 time to get through the -- I'm going to need time to get

1 through the documents.

2 THE COURT: Well, you've got until May. I mean,
3 you've got six months, five months.

4 MR. MARKHAM: Your Honor, could I?

02:00:29PM 5 THE COURT: Sure.

6 MR. MARKHAM: I would tell you that we made a deal for
7 these things that I'm not walking away from it. It was a
8 compromise deal. She wanted longer. I wanted what you wanted,
9 what you just suggested, but we have made a deal. What I've
02:00:43PM 10 suggested we do, unless the Court wants it sooner than that, I
11 just don't want to argue against the deal that I've made. I
12 believe there's not a chance for summary judgment. We have two
13 doctors who have written opinions that he has EHS, and it's
14 caused by what's in the school. She has some doctors who did
02:00:58PM 15 not make any diagnosis of what it was, and one of them doesn't
16 believe in EHS, the syndrome that we contend he has. There are
17 doctors out there, and I assume that will go her way, and it's
18 a factual question. I don't think it's going to have summary
19 judgment, but what would be very helpful, your Honor, is if the
02:01:14PM 20 court could give us a three-day trial date which we could
21 obviously vacate if --

22 THE COURT: So is it going to be a jury-waived trial?

23 MR. MARKHAM: It's interesting.

24 THE COURT: I know you've asked for damages, but --

02:01:25PM 25 MR. MARKHAM: Yeah. First of all, I found out a lot.

1 Under the ADA for an accommodation everything -- the only
2 people who are allowed to -- who are -- the ADA is imposed upon
3 are public accommodation owners. But public accommodations
4 take two types. One is private schools, private restaurants,
02:01:43PM 5 private movie theaters. You can't get damages against them.
6 You can only get attorneys' fees if the court orders them, and
7 you can get the injunctive relief.

8 There is another commission which says you can get
9 retaliation. You can get injunctive relief for retaliation,
02:01:58PM 10 but you can't get attorney -- you can't get attorneys' fees. I
11 mean can you get attorneys' fees, but not damages. However,
12 the courts have ruled that with respect to all accommodation
13 claims they are judge tried, not jury tried.

14 We have some supplemental claims under state law for
02:02:16PM 15 breach of contract because their contract glowingly talks about
16 how it will accommodate everybody, and we do not contend they
17 have done that. They deny that. That would be a jury trial
18 unless we were to drop those. We don't know whether we will or
19 not. So what we think is going to happen is unless the court
02:02:33PM 20 grants summary judgment, and I don't think it can given the
21 facts we already have, that we could be ready if they were to
22 assess the summary judgment. It wouldn't be that hard for the
23 court to decide it quickly. We would like a trial sometime in
24 June or July unless, of course, the Court grants summary
02:02:50PM 25 judgment and the Red Sox win, because if the court were to

1 grant us relief, it would be easily time to do that before the
2 school starts in September because nobody is at the school
3 except a couple of maintenance people. Our people could go in.
4 Their people could go in. We could implement the order by
02:03:05PM 5 rewiring a few things.

6 This time -- this year, we were hamstrung because we
7 didn't get in until after school started, and then there are
8 kids running all over the place until 3:30 every day, and then
9 they come back in at 5:00. So we had an hour and a half a
02:03:20PM 10 couple of days. So what we would like, your Honor --

11 THE COURT: Stop. Stop. Stop.

12 MR. MARKHAM: Okay.

13 THE COURT: I know what you want. All right. Let me
14 look at this. I mean, I want this done.

02:03:28PM 15 MS. McKEAN: May I be heard, your Honor?

16 THE COURT: No.

17 MS. McKEAN: I'm very -- I'm very concerned about
18 June.

19 THE COURT: No. Let me -- let me work. I'm going to
02:03:34PM 20 give you a schedule, and you guys will have to work through it.

21 MS. McKEAN: Can I just -- I would like to make a
22 statement about June though because given our agreement, we
23 reached an agreement with respect to this order. I have not
24 spoken with my clients about their availability for July. I
02:03:48PM 25 have though spoken with them about June because they were

1 concerned with this order in June because June is the end of
2 their school year, their finals, their commencement.

3 THE COURT: You won't -- the case will not be tried in
4 June.

02:04:01PM 5 MS. McKEAN: And Mr. Gustavson's daughter is then
6 graduating from college, and I haven't talked to them about
7 their availability in July because of the agreement we've
8 reached.

9 THE COURT: I'm going to go out on -- I'm going to go
02:04:12PM 10 out on a limb one more time here. I'm not sure I care about
11 their availability. This case needs to be tried. Okay.
12 So I'll -- let me look at this, and we'll give -- send you a
13 schedule, but get ready to try it this summer.

14 Okay. Thank you.

02:04:27PM 15 MR. MARKHAM: Thank you, your Honor.

16 MS. McKEAN: Thank you.

17 (At 2:04 p.m., Court was adjourned.)

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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript is a true and accurate
transcription of my stenographic notes before the Honorable
Timothy S. Hillman, to the best of my skill, knowledge, and
ability.

/s/ Marianne Kusa-Ryll

4/25/16

Marianne Kusa-Ryll, RDR, CRR

Date

Official Court Reporter